IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, *et al.*,
Petitioners,

v.

DR. LOUIS SULLIVAN,
Secretary of the Department of Health
and Human Services,
Respondent.

THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

DR. LOUIS SULLIVAN,
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and Human Services,
Respondent.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of

the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. This is especially so in cases affecting the most fundamental right—the right to life. The Conference filed written comments in support of the rules challenged in the instant case and appeared as *amicus curiae* before the Second Circuit in this case.

The Conference is concerned that reversal of the Second Circuit's judgment will hinder effective enforcement of Section 1008 of Title X of the Public Health Service Act, Pub. L. No. 91-572, 42 U.S.C. § 300, *et seq.* (1970), and undermine the federal government's policy disfavoring abortion. In 1970, Congress enacted Title X in order to deliver federally funded family planning services to low-income persons. Although Congress intended to deny Title X funds to programs where abortion was a method of family planning (42 U.S.C. § 300a-6 (Section 1008)), enforcement and implementation of this prohibition by the Department of Health and Human Services was informal and uneven. The Conference—as well as others—was openly critical of the Department's administration of Section 1008. In 1988, after much debate about the legitimacy of continuing Title X funding for programs which were also promoting abortion, the Department for the first time issued regulations enforcing and implementing Section 1008. The instant case challenges those important restrictions on the promotion of abortion in Title X projects, restrictions that are consistent with congressional intent, constitutional principle, and sound public policy. For that reason, the Conference supported the Secretary of the Department of Health and Human Services in the court below and continues to do so here.

The parties have consented to the appearance of the United States Catholic Conference as *amicus curiae*.

SUMMARY OF ARGUMENT

In 1970, in order to provide family planning assistance to low-income families, Congress enacted Title X of the Public Health Service Act. Pub. L. No. 91-572, 42 U.S.C. § 300, *et seq.* (1970). During the legislative debate leading to enactment of the statute, Congress carefully distinguished between methods which would prevent pregnancy and methods which would prevent birth by terminating pregnancy. Congress intended to fund a program aimed at providing contraceptive services but, at the same time, to ensure that Title X funds would not be used to promote or encourage abortion in any way. 42 U.S.C. § 300a-6 (Section 1008).

Until 1988, the Department of Health and Human Services (hereafter "HHS") issued no regulations specifically implementing Title X's abortion restriction. Prior to that time, the staff of the Public Health Service, through its grant application review guidelines, had effectively mandated the provision of abortion-related services in Title X programs. Thus, while Title X denies the use of federal funds in programs where abortion is a "method of family planning," Public Health Service staff had sidestepped this proscription by calling abortion referral a related "required service." *See* Bureau of Community Health Services, Department of Health and Human Services, Program Guidelines for Project Grants for Family Planning Services, Guideline 8.6 (1981) (hereafter "Guidelines").[1]

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[1] The Conference has always been concerned that the 1981 Guidelines were in tension with the policy of federal "conscience clauses." 42 U.S.C. § 300a-7(a), (c) (1982). The Public Health Service Guidelines, which envision a formal referral process designed to "assure" that abortion appointments are kept (*see, e.g.*, Guideline 7.4), clearly threaten to undermine federal policies designed to protect health care personnel from having to choose between institutional policy and their religious beliefs. For this reason, aside from their conflict with Section 1008, those 1981 Guidelines have long been considered illegitimate by the United

Through the use of these Guidelines, Title X grantees were openly arranging elective abortions for Title X clients in violation of Congress' clear proscription of such activity. It was no secret that organizations that performed, advocated, and encouraged abortion, such as petitioner Planned Parenthood, were major Title X grantees. As a result, the Public Health Service Guidelines became the target of much critical commentary; they were contrary to Title X and undermined broader federal policy encouraging childbirth over abortion—a policy embodied in, among other things, funding restrictions for abortion services. *See Harris v. McRae*, 448 U.S. 297 (1980). The eventual efforts by HHS to enforce Section 1008 of Title X were long overdue. No longer were Title X grantees able to create a mere "paper" separation between their operations providing family planning services and those providing abortion services. In many instances, some of which were described in the rulemaking record, Title X and abortion services had been openly offered together, sometimes in the same room within an organization. Thus grantees' clients were confused about the nature of Title X services, and the federal government's insistence that abortion was not to be promoted with federal money was made an apparent sham. Faced with these circumstances, HHS was within its regulatory discretion to implement Section 1008 by insisting on physical separation of abortion services and elimination of abortion advocacy from the Title X program.

The HHS regulations are entirely consistent with both the plain language of Title X and its legislative history. When Title X was enacted, abortion was a crime in virtually all states. The legislative history demonstrates that Congress intended for the Title X program to avoid

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States Catholic Conference. Because of their opposition to artificial contraception, Catholic organizations may not properly participate as grantees for the full scope of Title X services.

all involvement with abortion. In the 1988 rulemaking, HHS enacted its first binding interpretation enforcing that restriction, thereby correcting informal staff practice that was at best uneven and at worst contrary to law. This Court need only decide if the HHS regulations are reasonable and lawful—a standard these rules plainly satisfy.

Unlike programs in which constitutional rights are required to be surrendered as the price for receipt of some federal benefit, Title X rules demand only that prospective grantees be willing to abide by limitations designed to advance and protect the federal program. These rules place no new obstacles in the way of a pregnant woman's access to abortion. Indeed, as a pre-pregnancy program, Title X simply has no effect on a pregnant woman's relationship with her doctor. Forbearance from abortion advocacy and counseling is not the price of receiving a benefit but an essential component of the program. Private whim may not be allowed to convert a federal pre-pregnancy family planning program into a pre-natal (or more accurately, an "anti-natal") pregnancy services program. If grantees may resist programmatic restrictions with which they disagree, they would be able to change the character of this or any other program into something Congress never intended or even explicitly prohibited.

The lower courts in this case properly understood the discretionary nature of the statutory and regulatory power exercised by HHS. They also correctly understood the agency's right to implement Congress' decision to fund only programs where abortion is not a method of family planning. A review of the opinions below, as well as the rulemaking documents and records, will show that HHS faced and effectively responded to a serious challenge to the legitimacy of the only substantive proscription in Title X—that federal programs may not provide, encourage or counsel abortion. The Second Circuit's judgment must be affirmed.

ARGUMENT

The provision of family planning services in the United States, like so many other social services, reflects essentially a statutory combination of government and private resources. *See, e.g.*, Pub. L. No. 91-572, § 2 (1970) (Statement of Purposes for Title X). This form of public/nonpublic cooperation has effectively replaced the historically private social service system with a broader, government-supported umbrella of social services. Under such arrangements, government funds provide most of the financial support, with private entities supplementing the financial resources and supplying the direct delivery of services to the population. Such agreements, mandated by legislation, have both affirmative and restrictive aspects. Affirmatively, the government must depend on the goodwill of the private entity to assure that its policy goals are achieved. It also must demand enforcement of a program's restrictive requirements to ensure that public money is not misused by the grantees. The achievement of both statutory requirements is necessary for the proper delivery of social services under such programs.

In this case, private grantees challenge the restrictive requirements of a statute enacted by Congress and interpreted by the agency charged with enforcement. They seek to impose their own will on a federal social service program and transform the government's family planning policy from one encouraging pregnancy prevention to one fostering pregnancy termination. Their efforts must fail on both statutory and constitutional grounds.

I. THE REGULATIONS ISSUED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ACCORD WITH CONGRESSIONAL INTENT.

In 1970, Congress enacted a program to provide low-income individuals with family planning services, offering grants to public or nonprofit private entities to

execute the program according to its statutory terms—terms which included, among others, a prohibition against employing funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (Section 1008). The statute also carried a mandate for "such regulations as the Secretary may promulgate." 42 U.S.C. § 300a-4(a) (1982). The Secretary of the Department of Health and Human Services (HHS) accordingly promulgated implementing regulations. Among those are 42 C.F.R. § 59.2 (1989) which defines "Title X project funds" as all funds allocated to a Title X program, including but not limited to grant funds, grant-related income and matching funds.[2] Sections 59.8, 59.9, and 59.10 prohibit grantees from employing Title X project funds for counseling or referral for abortion services or for abortion advocacy efforts; they require the separation of facilities, personnel and records to enforce these prohibitions. Also, amended 42 C.F.R. § 59.7 (1989) requires grantees to provide "assurance satisfactory to the Secretary that [the program] does not include abortion as a method of family planning." *See* 53 Fed. Reg. 2944 (Feb. 2, 1988).

Not merely a prohibition on the use of Title X funds for the actual performance of abortions, Section 1008 broadly precludes the extension of any federal financial assistance to programs that promote or encourage abortion "in any way."[3] Petitioners see in Section 1008's language a ban only on actually providing abortions within a Title X program, not on speech about abortion.[4] But their reasoning is flawed. In every case, and in its every phase, the family planning process involves speech about family planning options. Information is an

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[2] Ordinarily, Title X grants constitute 90% or more of the total funding for a Title X program. 42 U.S.C. § 300a-4(a).

[3] 116 *Cong. Rec.* 37375 (1970) (Congressman Dingell).

[4] Petitioners' Brief at 41-42 (hereafter "Pet. Brief").

essential service in every family planning program. Abortion, advocated or referred for, is just as much a part of a Title X program as if it were provided. The result is the same: abortion becomes a method of family planning.

Further supporting this conclusion is the fact that certain family planning options remain part of a family planning program even when the grantee does not have the facilities to provide them but only refers clients to another facility. *See* Bureau of Community Health Services, Department of Health and Human Services, Program Guidelines for Project Grants for Family Planning Services (1981) (hereafter "Guidelines") 6.1 ("Structure of the Grantee") and 7.4 ("Referrals and Follow-up"); 42 C.F.R. § 59.5(b)(1) (1989) ("Each Title X project must: Provide for . . . necessary referrals to other medical facilities when medically indicated . . . ."). Oral referrals regarding an option make that option a part of the Title X project. Implementation of Section 1008 therefore requires that Title X programs neither provide nor refer for abortion.[5]

In enforcing the congressional mandate with the cited regulations, HHS drew a bright line between provision of preventive family planing services to those not yet pregnant and provision of services to pregnant women. Although this would appear to be a reasonable, even required, interpretation of Title X by the agency charged with enforcement, petitioners disagree with the location

[5] It is clear also from Section 1001 of Title X (42 U.S.C. § 300(a) (1982)) that the language of Section 1008 contemplates a ban on more than abortion procedures. Section 300(a) requires grantees to "offer" family planning methods and services, and lists specific types. But Section 1008 does not prohibit merely "offering" abortion. It bans, more broadly, "abortion . . . [as] a method of family planning."

of the line HHS has drawn and with the selection of measures to enforce it. It remains, nevertheless, the prerogative of HHS—not petitioners or a court—to choose specific methods for implementing Congress' intent to limit Title X funds to projects providing only pre-pregnancy services. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

A. Congress Intended to Fund Only Pre-pregnancy Services, Not to Allow Grantees to Encourage or Promote Abortion in Title X Programs.

Although some terms in Section 1008 may admit of more than one construction, this much is certain: Section 1008 precludes the facilitation and promotion of abortion in Title X programs.[6] How HHS was to administer this prohibition is not prescribed. Title X would appear to permit HHS a range of permissible options to bar federal funds from programs using abortion as a method of family planning. It is axiomatic that an agency's choice among alternative regulations for implementing a statute is a decision reserved exclusively to that agency and will not be overruled if it is reasonable in light of all the circumstances. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). Thus the district court correctly determined that the "new regulations do not offend the direction contained in section 1008 . . . ." *New York v. Bowen*, 690 F. Supp. 1261, 1272 (S.D.N.Y. 1988). The Second Circuit properly upheld that determination. *New York v. Sullivan*, 889 F.2d 401 (1989), *cert. granted*, 110 S. Ct. 2559 (May 29, 1990). The First Circuit, *en banc*, reached a similar conclusion. *Massachusetts v. Sullivan*, 899 F.2d 53, 64 (1st Cir. 1990).

[6] *See* note 3, *supra*.

That direction was spelled out explicitly by Representative Dingell, a principal sponsor of a Section 1008 amendment, in his floor statement:

> With the "prohibition of abortion" amendment—Title X, Section 1008—the committee members clearly intend that *abortion is not to be encouraged or promoted in any way through this legislation* . . . .
>
> There is a fundamental difference between the prevention of conception and the destruction of developing human life. Responsible parenthood requires different attitudes toward human life once conceived than toward the employment of preventive contraceptive devices or methods. What is unplanned contraceptively does not necessarily become unwanted humanly . . . .

116 *Cong. Rec.* 37375 (1970) (emphasis added). Continuing, Representative Dingell observed that:

> If there is a direct relationship between family planning and abortion, it would be this, that properly operated family planning programs should reduce the incidence of abortion.

Id. He also cited "evidence that abortion as a method of family planning has a negative effect on the implementation of family planning programs," and that "the prevalence of abortion as a substitute or a back-up for contraceptive methods can reduce the effectiveness of family planning programs." *Id.*[7] HHS properly concluded from

[7] As early as 1970, the possibility that abortion availability could undermine the prevention of pregnancies had already been explored in D. Callahan, *Abortion: Law, Choice and Morality*, Chapter 7 (1970). More recent analyses include: K. Luker, *Taking Chances: Abortion and the Decision Not to Contracept*, 10 and n.e (1975) ("California women seem to bemaking a *de facto* choice of abortion as a method of fertility control." The legalization of abortion has apparently led to a "reduced motivation to use contraceptives."); R. Sherlock, "The Demographic Argument for Liberal Abortion Policies: Analysis of a Pseudo-Issue," in *New*

its review of legislative history that "Title X is meant to fund the provision of preventive and other pre-pregnancy family planning services, and not to promote or encourage abortion in any way." 52 Fed. Reg. 33,210 (Sept. 1, 1987). Petitioners' attempt to import abortion into Title X as a backup to contraception [8] must fail in light of this legislative history, especially Representative Dingell's clear statement to the contrary.[9]

Other legislative activity also supports the choices HHS made in its effort to effectuate the congressional mandate embodied in Section 1008. For example, in 1978, during debates concerning possible amendments to Title X, Representative Dornan proposed to amend Section 1006 of Title X to strengthen the antiabortion restriction, as follows:

> No grant or contract authorized by this title may be made or entered into with an entity which directly or indirectly provides abortion, abortion counseling, or any abortion referral services.

124 *Cong. Rec.* H13289 (daily ed. Oct. 13, 1978). The proposed amendment was refused on the grounds that Section 1008 of the Act already encompassed the proffered prohibitions. Representative Rogers, a member of the Public Health & Welfare Subcommittee at the time Title X was enacted, stated:

Perspectives on Human Abortion (Hilgers, Horan and Mall eds. 1981) 450-65, especially 456-60; and Kasun, "Cutoff of Abortion Funds Doesn't Deliver Welfare Babies," *The Wall Street Journal*, Dec. 30, 1986 (suggesting that a cutoff of public funding for abortion in Ohio and Georgia led more people to "take steps to reduce conception").

[8] Pet. Brief at 41 n.74 ("Title X programs, . . . treat abortion as a backup to contraceptive or human failure . . .").

[9] Petitioners acknowledge that a statute's contemporaneous legislative history constitutes "the most reliable indicator of congressional irtent . . . ." Pet. Brief at 42 n.77.

> Abortion is not a method of family planning. *Abortion comes after pregnancy—after pregnancy. And the gentleman misses the point of what we are doing in Title X. It's before—before. It is to let people know how to avoid pregnancy.* We cannot use any funds for abortion. The amendment is not needed.

Id. (emphasis added).

Further support for the conclusion that HHS correctly interpreted the legislative history applicable to Title X is found in the state of the law concerning abortion at the time Congress enacted Title X.[10] In 1970, abortion was illegal in most states and the District of Columbia. *Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973).[11] Therefore, if Congress intended to permit Title X projects to advocate, counsel or refer for abortions, it would have been encouraging and even funding activity that was criminal in a majority of states. More importantly, Title X was not drafted anticipating a change in the legal status of abortion in 1973, nor was it ever amended to do so. If it is the overwhelming consensus of the existing laws that

[10] According to settled principles of statutory construction, it is appropriate to consider the state of the law contemporaneous with the legislation at issue to discern Congress' true legislative intent respecting the statute. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 318, 319 (1983) ("We may presume 'that our elected representatives, like other citizens, know the law,'" (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979))).

[11] Petitioners' suggestion that, in 1970, the "vast majority of states permitted abortions under varying circumstances" (Pet. Brief at 43 n.78) is a misleading characterization of the true state of the law in 1970. This Court recognized in *Roe* that for a long period of time prior to 1973, a majority of states criminalized abortion in *all* cases *save* when a mother's life was at stake. 410 U.S. at 118 n.2.

certain conduct is forbidden, even criminal, this is indeed weighty evidence that a legislature did not intend to permit, finance or encourage it in any way.

The fact that abortion was generally illegal in 1970 is of additional importance because, in 1987, Representative Dingell criticized the proposed HHS regulations as inappropriate to the *current* legal environment. He even attempted to recant his various floor statements which were part of the 1970 legislative history.[12] But his *post facto* attempt to revisit and revise the legislative history has no legal or interpretative effect. The HHS regulations are valid whether or not his 1970 remarks specifically suggested or intended the precise requirements eventually imposed by HHS. HHS—as well as this Court—must consider the state of the law concerning abortion at the time Title X was enacted to discern true congressional intent, despite changes in the law since 1970. This is not a principle of limitation but a canon of construction;[13] it mandates that because legal liability would have attended "*any part of the* [*abortion*] *referral process*,"[14] HHS must understand Congress to have intended that Title X programs be completely separate from that process.

[12] First he argued that his remarks did not "suggest" endorsement of any specific requirements to be imposed by regulations. Then he stated that the full content of remarks in the Conference Report evidenced a congressional intent not to interfere with the activities of "organizations" supported by non-Title X funds. Third, he suggested that HHS should have "viewed in a different light" the legal concerns giving rise to his 1970 comments. By specific referral to *Roe v. Wade*, he also noted that his statements were delivered during a period when "legal liability could . . . have attended any part of the referral process" and that HHS is "required," under principles of statutory construction, to make "reference to the state of the law at the time legislation [was] passed." Letter from John D. Dingell to Otis R. Bowen (Oct. 14, 1987).

[13] *See* note 10, *supra*.

[14] *See* letter from John Dingell, note 12, *supra* (emphasis added).

B. The Court of Appeals Correctly Concluded that the Regulations, the First Authoritative Interpretation of Section 1008, Are Reasonable and Lawful.

It is no secret that many Title X grantees are among the leading abortion services providers in the United States. It is plain where the sympathies of these grantees lie in the public controversy over abortion. It is also plain that such grantees operated programs where the separation between Title X and abortion services was only as strong as their commitment to furnish forms and other paperwork showing that no federal, as opposed to non-federal, Title X money was spent on abortion. The record compiled in the rulemaking proceeding suggests that the client population was sometimes misled and often confused by such activities.[15] In order to correct such misinterpretations and end any confusion, binding regulatory action was needed to separate Title X programs from abortion and, thus, enforce the statute. 53 Fed. Reg. 2923 (Jan. 28, 1988). In order to so act, the Secretary of HHS had to address himself to prior practise by his own agency.

As the Second Circuit observed: "The fact that an agency is departing from a long-held prior interpretation is of course an item to be taken into account by a court reviewing agency action." *Sullivan*, 889 F.2d at 409. The only evidence of "prior interpretation," in this

[15] The rulemaking docket contains evidence that numerous clients of Planned Parenthood facilities (one of the largest recipients of Title X funding) were actively advised to seek abortions, in contravention of Title X (and even the 1981 Guidelines permitting, at most, abortion *referrals*). At least 33 letters commenting upon the proposed regulations spoke to these abuses. *See* affidavits of various Planned Parenthood officials acknowledging that abortion is regularly counseled as a "backup" contraceptive method at their facilities. *Planned Parenthood Federation of America v. Bowen*, Civ. Action No. 88 W 158 (D. Colo. 1988) (affidavits of Karril Galloway, Kirtly Jones, Marilyn Foelski and Sylvia Clark).

case, however, are internal HHS memoranda and letters, and the 1981 staff Guidelines.[16] *See generally, Bowen*, 690 F. Supp. at 1269-71. Such documents do not have the same official status as regulations or administrative decisions binding on both the agency and the public, and are not entitled to the same deference by agencies, or by courts reviewing new rulemaking on the same subject. *Davis v. United States*, 110 S. Ct. 2014, 2022 (1990).[17] In *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Auto Ins. Co.*, and *NLRB v. Bell Aerospace Co.*,[18] two cases relied upon by petitioners, federal executive entities allegedly departed from precedent established in hearings before their administrative boards. Until overruled or modified, such precedent indeed binds agencies to act in a particular way. But the instant case involves only interpretive guidelines,[19] memoranda and opinion letters—a significant difference.

Traditionally, "interpretive guidelines" are not binding except on the staff and are not entitled to the defer-

[16] Regulations implementing but not interpreting Section 1008 were issued in 1971 (36 Fed. Reg. 18,465, Sept. 15, 1971) and revised in 1980 (45 Fed. Reg. 37,436, June 3, 1980). Both merely stated that Title X projects could not "provide abortions as a method of family planning."

[17] As the court of appeals also correctly observed (*Sullivan*, 889 F.2d at 409), an agency may change its mind, especially when faced with circumstances demanding regulatory attention. *American Trucking Ass'ns v. Atchison, Topeka & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967). Such reconsideration by an agency is entitled to judicial deference. *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

[18] Respectively, 463 U.S. 29 (1983) and 416 U.S. 267 (1974).

[19] The Guidelines state that their purpose is merely to "*interpret*[] *the law and regulations.*" Guidelines 2.0 (emphasis added). Additionally, a United States Court of Appeals specifically judged these Guidelines to be "interpretive" only. *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981).

ential judicial review accorded regulations. *Davis v. United States, supra. See also Morton v. Ruiz,* 415 U.S. 199 (1974); *Joseph v. United States Civil Service Commission,* 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) ("Interpretative rules do not have the force of law and even though courts often defer to an agency's interpretative rule they are always free to choose otherwise.") Internal memoranda bear even less official weight since they are not intended for public scrutiny. *See Morton v. Ruiz, supra.* At most, the evidence in this case suggests that a course of action was followed by HHS administrators because the internal memoranda involved are from legal counsel.[20] It would have been equally warranted for administrators to have departed from that advice, especially to the extent internal documents were inconsistent with the statute. *Morton v. Ruiz,* 415 U.S. at 237 ("In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose").[21]

[20] In seeking to maintain the importance of a 1971 internal memorandum authored by HHS attorney Joel Mangel, due to its contemporaneity with Title X's passage, petitioners cite four cases. Not one involves contemporaneous interpretation similar to this memorandum. *NLRB v. United Food & Commercial Workers,* 484 U.S. 112, 124 n.20 (1987) (contemporaneous regulations); *EEOC v. Associated Dry Goods Corp.,* 449 U.S. 590, 600 n.17 (1981) (contemporaneous regulations); *Bankamerica Corp. v. United States,* 462 U.S. 122, 130 (1983) (policy of not enforcing against certain defendants since statute's inception). In the fourth case, this Court affirmatively asserted the superiority of regulations to "interpretive rulings." *Davis v. United States,* 110 S. Ct. at 2022.

[21] Besides contradicting Title X, the Guidelines also contradict the broader federal policy favoring childbirth over abortion by encouraging abortion activities in programs receiving federal financial assistance (*see Harris v. McRae,* 448 U.S. 297 (1980)). One should extend a broad reading to the abortion restriction in order to protect the federal policy disfavoring abortion. *See Webster v. Reproductive Health Services,* 109 S. Ct. 3040, 3052 (1989) ("[T]he State need not commit *any* resources to facilitating abortions, even if it can turn a profit by doing so.") (emphasis added).

In any event, as both lower courts in this case recognized, the HHS Secretary was not bound to follow such advice. *Sullivan,* 889 F.2d at 409; *Bowen,* 690 F. Supp. at 1270-72.

As the first binding interpretation of Section 1008 issued under HHS rulemaking powers, the challenged regulations are judged only by the ordinary standards applicable to notice and comment rulemaking. So long as these rules are reasonable and lawful, they survive judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. at 415, 416. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519 (1978). Reasonableness is a minimal standard: if any set of facts appears in the record to support the rules, the agency must prevail.[22] The Court "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron,* 467 U.S. at 843 n.11; *Udall v. Tallman,* 380 U.S. 1, 16 (1965). Lawfulness is measured by compliance with relevant statutory and constitutional restrictions. When regulations, whether initial or revised, are "fully consistent" with "the language and history" of the statute, as the HHS regulations are in this case, they "must be upheld" by a reviewing court. *Sullivan,* 889 F.2d at 409. That considered judgment by the Second Circuit reflects proper application of Supreme Court precedent to the particular facts of this case.

The staff Guidelines called referral for elective abortion a related "required service" and not a "method of family planning." Guidelines 8.6, *supra.* By so designating it, the staff effectively avoided Section 1008's proscription by simply defining away the restriction. The

[22] A sufficient basis for the rules is set forth in the rulemaking documents and comments and will not be restated here. *See* 53 Fed. Reg. 2944 (Feb. 2, 1988).

Guidelines, which bound only HHS staff in charge of reviewing grant applications and grantee performance, effectively "required" as a condition of funding that grantees refer for abortion as an "other required service" whenever requested or whenever grantee personnel were inclined to do so. The Department, as distinguished from the staff, never issued binding and clear regulations on the Title X abortion restriction until 1988. For the reasons stated above, the 1988 rules separating Title X from abortion services, and prohibiting counseling and abortion advocacy, survive proper statutory analysis. Indeed, those regulations were the first correct interpretation of Section 1008 ever offered by HHS or its staff. They are easily within the discretion of the agency responsible for promulgating regulations implementing Section 1008.

II. THE TITLE X REGULATIONS DO NOT INFRINGE CONSTITUTIONAL RIGHTS.

Petitioners complain that the Title X regulations confront those clinics receiving non-Title X funds for abortion counseling, referral, or advocacy with two untenable alternatives: compliance with an unduly burdensome separation requirement or loss of Title X funding. They complain that each of these alternatives infringes their exercise of constitutional rights. In effect, petitioners insist on the ability to spend Title X program-related funds in any manner. To sustain their argument, they distort the realities of government grant funding by attempting to distinguish among the sources of funds for the Title X program as the basis for their complaint, and they demand constitutional relief where none is warranted.

A. Freedom of Speech is Not Abridged by the Title X Regulations.

Within the limits of its constitutional authority, Congress has broad discretion to formulate social services programs. It is the considered judgment of the Congress,

implemented by the Executive Branch, that childbirth is preferred over abortion. This policy is reflected in funding restrictions generally (*Harris v. McRae*) and in federal family planning programs. Both federal family planning programs, Title X, the statute at issue here, and Title XX, the Adolescent Family Life Act (hereafter "AFLA"),[23] fund family planning and pregnancy services *without* an abortion component. Petitioners claim that exclusion of abortion services from Title X programs constitutes an unconstitutional penalty. But it is Congress, and not petitioners, that establishes the parameters of such government programs. As this Court observed in *Maher v. Roe*, 432 U.S. 464, 475 (1977):

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

See also Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3052 (1989). Because the expenditure of federal funds and conduct of federal programs may be limited by congressional policies favoring childbirth over abortion, the lower courts properly affirmed the Title X regulations against constitutional challenge. The district court correctly concluded, and the court of appeals agreed, that no grantee would be improperly deprived of any "rights" to speak about abortion. *Sullivan*, 889 F.2d at 412. "The regulations do not prohibit or compel speech. They grant money to support one view and not another, but that is quite different from infringing on free speech." *Bowen*, 690 F. Supp. at 1274.

Federal benefit programs are in the nature of "contracts." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).[24] On one side of any po-

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[23] 42 U.S.C. §§ 300z, 300z-5(a)(21) (1982).

[24] As the Supreme Court stated in *Pennhurst*, 451 U.S. at 17: "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States

tential Title X "contract" is the government, extending an offer containing the above-described terms. On the other side is the potential grantee who can accept or reject the extended offer according to its terms. Of course, part of the decision to accept involves a separate determination by the grantee whether to raise and commit non-federal funds to the purposes of the project, *e.g.*, family planning services along the lines of the program.[25] Only when a grantee chooses to commit its funds (approximately 10% of the program's costs, but sometimes more)[26] will the grant restrictions be both accepted and enforceable. Once committed, those funds are as much "Title X project funds" as the grant itself. 42 C.F.R. § 59.2 (1989). This result is consistent with this Court's earlier holding in *Grove City College v. Bell*, 465 U.S. 555, 571 (1984) (interpreting "program or activity"), that conditions applicable to federally funded programs also restrict privately funded activities within the program. 465 U.S. at 571 n.21.

It follows then that any so-called "private" funds a Title X project possesses derive logically from the Title X grant. HHS is not denying a government benefit to grantees because of their exercise of protected speech with private funds. By enforcing the statute, HHS denies them unrestricted use of funds generated to support a federal program. *See Bowen*, 690 F. Supp. at 1273,

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agree to comply with federally imposed conditions." *See also Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

[25] Petitioners unsuccessfully attempt to diminish the significance of federal grant funds in Title X programs by citing statistics showing that such funds do not constitute the largest percentage of certain agencies' total "family planning programs" or total sources of support. See Pet. Brief at 25-26 n.43, 26 n.44, 3 n.5. But petitioners' figures do not represent how significant a percentage of the *Title X programs* government funds represent—commonly 90% or more of the funds of each Title X program.

[26] *See* 42 U.S.C. § 300a-4(a) (Section 1006).

1274. To allow non-federal funds, generated to enable participation or acceptance of the grant, to dictate the conduct of the federal project, eviscerates the federal intent and subverts the federal purpose.

Potential Title X grantees cannot unilaterally "reformulate" the terms of the government's offer, and proceed to accept it as reformulated. A grantee cannot decide that it will sponsor a program offering abortion as a method of family planning *and* that the government *will* contribute public funds to that program. This is analogous to holding that grantees of a federal program established to combat drug use could use their 10% non-federal funds to advocate decriminalization of illegal substances. *See Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983). This approach to federal grants was soundly rejected by this Court in *Grove City College v. Bell, supra.* There the College and some of its students claimed that Congress could not condition the receipt of federal financial aid upon forbearance from certain First Amendment associational rights. This Court framed the issue in contract language and summarily resolved it:

> Grove City's final challenge to the Court of Appeals' decision—that conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students—warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept [citing *Pennhurst v. Halderman, supra*]. Grove City may terminate its participation in the BEOG [federal educational assistance] program and thus avoid the requirements of § 901(a) [the antidiscrimination provision]. Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance.

Id. at 575-76. Similarly, forbearance from abortion advocacy, counseling and referral, in the context of a Title

X project, is not a price paid for receiving a benefit but an essential feature of the federal government's family planning programs. To claim otherwise implies that proposed recipients of federal grants could demand their receipt on terms unilaterally fashioned by the grantees.[27]

Petitioners would force the federal government to grant them Title X funds for use in programs contravening the *only specific prohibition set forth by Congress* —that abortion not be employed as a method of family planning. Petitioners claim that the government is presuming to regulate the content of speech by insisting upon the non-performance of certain abortion-related activities with private funds. But, like the federal financial assistance at issue in *Grove City*, Title X funds are not monies which grantees are "obligated to accept."

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[27] In *Bowen v. Kendrick*, 487 U.S. 589 (1988), now on remand to the U.S. District Court, a group of plaintiffs attacked the constitutionality of the AFLA. Counsel for the plaintiffs in *Kendrick* are provided by the same American Civil Liberties Union Foundation Project that represents petitioners in this case. Plaintiffs in *Kendrick* complained that the statute (as opposed to the grants themselves) *fails* to restrict grantees from providing information about religion to clients in their AFLA programs. 487 U.S. at 597. Plaintiffs there would apply a broad restriction to all program funds, regardless of the source, and to all activities, even those outside the AFLA program. *See* Appellees' and Cross-Appellants' Brief in the United States Supreme Court, Nos. 87-253, 87-431, 87-462 & 87-775, at 37-41. Plaintiffs in *Kendrick* claim the Establishment Clause of the First Amendment as the basis for their insistence on prohibiting religious speech in AFLA programs, but their definition of religious speech includes speech concerning abortion and, necessarily, contraception. *Id.* at 48-49, 56-57. To adopt petitioners' line of argument in this case would allow the AFLA grantees in *Kendrick* simply to ignore any program content restrictions and insist that they have free speech *and* free exercise rights to use private funds to teach "religious dogma" in connection with their AFLA programs. Such use of conflicting first amendment interpretations in order to advance a pro-abortion agenda trivializes the constitutional freedoms of speech and religion.

465 U.S. at 575. Thus, grantees are not presented with a dilemma involving choices of a constitutional dimension. They are given the opportunity to participate in a program advancing certain goals and not others.

Allowing the "private," unlimited abortion advocacy or referral petitioners seek would distort the essential message of the government's family planning policy.[28] It would threaten the government's credibility and related interests and hinder the effectiveness of the family planning program. In other words, because a Title X program is part of the government's overall family planning policy, any abortion facilitation or advocacy in the context of a Title X program would necessarily reflect upon the government's policies and weaken the overall family planning program. Indeed, as recited in the 1970 legislative debate and confirmed afterward in studies,[29] facilitating access to abortion as a "backup" birth control method undermines the effectiveness of pregnancy prevention efforts. The government's legitimate interest in the enforceability and credibility of its own programs is evident. The objective of the regulations is not to suppress abortion-related speech but to protect public programs from private corruption. Such regulations do not infringe First Amendment rights.

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[28] Again, an analogy from the *Kendrick* case is instructive. If Title X grantees are constitutionally entitled to violate grant restrictions by injecting some of their own monies into the provision of services, then AFLA grantees must have the same, if not greater, constitutional right to discuss religious issues during client sessions not paid for with grant moneys, to use private funds to publish religious materials for their clients, and to refer AFLA clients to clergy outside the program for spiritual counseling. No one in that case is yet contending for such extraordinary privileges, but if petitioners are successful with such arguments here, there is no reason similar arguments should not be proffered, and prevail, in *Kendrick*.

[29] *See* note 7 and accompanying text, *supra*.

B. A Pregnant Woman's Relationship With Her Physician is Not Burdened by the Regulations.

Title X concerns only family planning, which involves pre-pregnancy services. By definition, abortion does not facilitate or prevent pregnancy; it is a procedure employed when preventive measures have not been used or have failed. Abortion is therefore beyond the scope of Title X. HHS recognized this simple fact in the Background section of its introduction to the proposed rules when it cited relevant legislative history in support of its rulemaking. 52 Fed. Reg. 33210-11 (Sept. 1, 1987). For example, the Conference Committee reported in connection with enactment of Title X:

> [I]t is, and has been the intent of both Houses that funds authorized under this legislation be used only to support preventive family planning services, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, *in order to make clear this intent.*

Conf. Rep. No. 91-1667, 91st Cong., 2d Sess. 8-9 (1970) (emphasis added). This Court may decide, for this reason alone, that petitioners' argument that these regulations interfere with a pregnant woman's right to consult with her physician concerning whether to choose childbirth or abortion, falls far wide of the mark.[30] But

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[30] If Title X were a federal program designed to provide prenatal care to pregnant women, petitioners might have some opening at least for making their privacy argument, though it would fail. That it would fail is indicated by this Court's decision in *Webster*. 109 S. Ct. at 3050-53. The statutes at issue there clearly were aimed at abortion and other pregnancy-related services, but plaintiffs' attempts to overcome those statutory restrictions on providing abortion services were rejected, as were similar arguments in *Harris v. McRae* and *Poelker v. Doe*, 432 U.S. 519, 521 (1977). In the case at hand, petitioners' arguments are similarly deficient, as

where Congress has explicitly limited a grant program to pre-pregnancy services, and has excluded abortion specifically to emphasize that intent, arguments concerning what might be constitutionally mandated in a program directed at pregnant women are completely irrelevant.[31]

Petitioners rely heavily on this Court's decisions in *Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians & Gynecologists*[32] for their primary argument that the HHS regulations interfere with a woman's right to choose abortion. *See also Sullivan*, 889 F.2d at 417 (Kearse, J., dissenting). Both cases, however, addressed statutory schemes that came into effect only when a woman was pregnant and seeking abortion; they were not pre-pregnancy services programs. In addition, those cases must be read in light of *Webster*'s recognition of a diminished constitutional status for the abortion decision and the enhanced strength of society's interests in regulating abortion *throughout* pregnancy. 109 S. Ct. at 3057-58.

In *Webster*, the majority opinion in *Thornburgh* came under severe criticism, especially to the extent it relied

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both lower courts determined (*Sullivan*, 889 F.2d at 411-13; *Bowen*, 690 F. Supp. at 1272-74), and they are wholly inappropriate in a pre-pregnancy program.

[31] For this reason, the majority of the court of appeals should have explicitly disavowed, not acquiesced in, Judge Kearse's assertion in dissent that the regulations may impede a pregnant woman's exercise of her right of privacy. *See Sullivan*, 889 F.2d at 411. Even if such a right properly extended to abortion, it is not implicated by a federal program that has no pregnancy, let alone abortion, component. It is more than questionable whether privacy rights stretch so far. *See* Brief of the United States Catholic Conference, *Amicus Curiae* in *Webster v. Reproductive Health Services*, United States Supreme Court No. 88-605; Chopko, *Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium*, 12 Campbell L. Rev. 181 (1990).

[32] Respectively, 462 U.S. 416 (1983) and 476 U.S. 747 (1986).

on the trimester approach from *Roe v. Wade* to invalidate restrictions on abortion availability. *See* 109 S. Ct. at 3057-58 (Rehnquist, C.J., with White and Kennedy, J.J.), 3063 (O'Connor, J., concurring), 3064 (Scalia, J., concurring). With regard to *Akron*, the plurality announced:

> There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as . . . *Akron v. Akron Center for Reproductive Health, Inc., supra.*

Id. at 3058; *see also id.* at 3063 (O'Connor, J., concurring), 3064 (Scalia, J., concurring). Therefore, even when reviewing governmental regulation of abortion, versus pregnancy prevention, uncritical reliance on those two opinions is unavailing.

Moreover, the specific regulations at issue here would be permitted even if *Thornburgh* and *Akron* stood unscathed. A majority in *Webster* stated: "*Maher, Poelker,* and *McRae* all support the view that the State need not commit *any resources to facilitating* abortions, even if it can turn a profit by doing so." 109 S. Ct. at 3052 (emphasis added). With that sentence, this Court preempted petitioners' argument in this case that Title X grantees must be permitted to facilitate abortions for clients who seek them within Title X programs, as well as the argument that matching funds can be applied to any purpose, even purposes Congress expressly prohibited. A grantee's funding contribution is indisputably a *resource committed* to the program. As such, its use is subject to Title X, and no constitutional right is implicated by requirements that it be expended solely in furtherance of family planning activities and not to facilitate abortion.

Finally, no new obstacles to obtaining an abortion are created by the Title X regulations. *See Harris v. McRae,* 448 U.S. at 315. This is underscored by the fact that the

intended beneficiaries of Title X are not required to perform or refrain from any activity. *Webster,* 109 S. Ct. at 3052. It is merely the grantee that is required to refrain from abortion-related activity in the Title X program. Their clients retain the choices they had prior to the institution of the regulations at issue. Just as the students in Grove City College had no right to have the government finance their choice of a particular school, Title X clients cannot claim a constitutional right to have facilitation of their abortion decision subsidized by government funds. *Grove City,* 465 U.S. at 576; *see also Taxation With Representation,* 461 U.S. at 549. As this Court announced in *Maher,* 432 U.S. at 474, and reiterated in *Webster,* 109 S. Ct. at 3052: "[T]he State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds . . . .'" The long overdue implementation of Section 1008 of Title X by HHS represents just such a judgment.

CONCLUSION

For the above reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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